Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

HUGHES SALARIED RETIREES ACTION COMMITTEE, PETER FORMO, RICHARD E. MILLER and NORMAN C. RIGBY, Individually and as Members,

Petitioners,

vs.

ADMINISTRATOR OF THE HUGHES NON-BARGAINING RETIREMENT PLAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Administrator of the Hughes Non-Bargaining Retirement Plan (Administrator) respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Hughes Salaried Retirees Action Committee, Peter Forma, Richard E. Miller and Norman C. Rigby (Petitioners).

Review by this Court is unnecessary because (a) the decision of the Ninth Circuit Court of Appeals sitting *en banc* has established the rule to be followed with respect to the disclosure of plan participant lists, serving exactly the purpose for which such *en banc* courts are created, and there is no circuit conflict; (b) the Ninth Circuit found it unnecessary to reach one issue that is potentially significant, thus providing another reason why this Court should await further development in the law; (c) while the instant case may technically constitute a "final judgment" for this Court's jurisdictional purposes, at bottom the instant case is but a procedural prelude to the dispute on the merits, which is being litigated in a different case; (d) the decision not only does not conflict with any decision of this court, it in fact is consistent with this Court's holdings; and (d) the decision below is properly decided and this Court would simply affirm in any event.

I. STATEMENT OF THE CASE

The Hughes Non-Bargaining Retirement Plan (the Plan) has approximately 60,000 participants. In 1987, the value of the Plan's assets was more than $1 billion greater

than its current, accrued liabilities. This overfunding provided a tempting lure. The individual Petitioners, who receive defined pension benefits from the Plan, sought to solicit support from some 10,000 fellow retirees in an effort to exert pressure on their former employer, Hughes Aircraft Company (Hughes), to increase the retirees' pension benefits beyond the level defined by the Plan. When the Administrator refused their request to furnish the individual Petitioners with a list of the names and addresses of all retired participants of the Plan, Petitioners brought this action to obtain such a list supposedly "to communicate with them about matters of concern to all retired participants regarding their pensions." (App. 5a.) In particular, the Petitioners stated they wanted to communicate with other retirees about Hughes' alleged "unlawful use of excess Plan assets for the sole purpose of meeting Hughes' funding obligations" and "to gain support for their efforts to obtain increased benefits through negotiation or if required, litigation, as well as to monitor the Plan." (*Id.*)

Meanwhile, in a related matter, *Jacobson v. Hughes Aircraft Co.*, Docket No. 93-55392 (9th Cir.), five other retirees who received defined benefits from the Plan sought to terminate the entire Plan and to distribute the assets of the Plan to the participants, the majority of whom were current Hughes employees. The appeal from the District Court's dismissal of that claim is currently pending before the Ninth Circuit.

When the instant case – the names-and-addresses dispute – reached the Ninth Circuit, no other federal circuit had considered the reach of a plan fiduciary's obligation to make available a plan participant list either

under the reporting and disclosure provisions of ERISA or under the general fiduciary responsibility provisions of the Act. The Ninth Circuit, sitting *en banc*, definitively resolved this question, concluding first that the participant list is not an "instrument [ ] under which the plan is established or operated," and thus is not subject to disclosure under ERISA's plan instruments disclosure provision, ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), and second that a plan administrator does not have a fiduciary duty to furnish such a list under ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). (App. 4a, 5a.) The Ninth Circuit continued that, on this record, it need not resolve whether ERISA's general fiduciary provisions could require the disclosure of documents that are not required to be disclosed under ERISA's specific disclosure provisions, because here the participant list did not relate to the provision of benefits or the defrayment of expenses, and thus could not trigger any fiduciary disclosure obligation. (App. 13a.)

The Court of Appeals observed that the list Petitioners requested did not provide information or access to information about benefits or the Plan itself, but rather that Petitioners sought to use the list "to solicit financial support for future litigation" despite the fact that ERISA provides specifically for the recovery of costs and attorneys' fees by prevailing parties.[1] (App. 17a.) Petitioners now solicit this Court to intervene on the side of their campaign to seek financial support for their attempt to

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[1] If the *Jacobson* plaintiffs were to prevail on the merits, presumably they would claim costs and attorneys' fees under ERISA's fee provision, Section 502(g), 29 U.S.C. § 1132(g).

obtain the surplus Plan assets. In the instant case, in effect they seek a procedural victory that they hope will support *Jacobson*, the second lawsuit now pending before the Ninth Circuit. Respondent, the Plan Administrator, submits that there is no appropriate reason for this Court to do so.

II. REASONS FOR DENYING THE PETITION

A. The *En Banc* Decision Has Resolved The Participant List Issue, And There Is No Circuit Conflict.

The first reason for denying review is that this case presents a showcase example of the role *en banc* courts are created to fulfill. A statutory question now has been answered, and there is no reason for this Court to revisit that answer. Petitioners sued to force an administrator of a pension plan with thousands of participants to provide them the names and addresses of the plan participants even though no issue had arisen concerning the payment of the benefits defined under the Plan. The Ninth Circuit, *en banc*, answered that question and established a clear rule, finding that the participant list is not a plan instrument subject to disclosure on pain of the penalties enumerated in ERISA, and is not sufficiently related to the provision of benefits to trigger any additional fiduciary obligation to supply information. Petitioners do not suggest that this rule, now established, conflicts with any decision of another Court of Appeals.

There is no reason for this Court now to take up the issue. The Ninth Circuit having established the rule *en*

banc, this Court is in the position to await further developments in the law. If a conflict develops, this Court can resolve it in a later case. If none develops, the legal issue can remain settled unless and until Congress changes the law. Indeed, the policy issue is one especially well suited for Congress to resolve. The *en banc* ruling put to rest the fears of Amici Curiae Hughes Aircraft Retirees Association, Hughes Employees Association and Western Conference of Teamsters that disclosure of a participant list would invade the right to privacy of other participants and unnecessarily increase plan administrative costs. Balancing such policy interests against any interest that may be served by disclosure is best left to Congress, which is free to act should it wish to broaden ERISA's disclosure obligations beyond those it created in this "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

B. The Ninth Circuit's Decision Did Not Reach A Broader Fiduciary Issue; If This Court Ever Were To Want To Take A Case In This Area, It Should Await A Case In Which That Issue Has Been Resolved.

On the facts of the case, the Ninth Circuit was not required to decide whether disclosure of plan documents can ever be required under the general fiduciary duty provisions of ERISA rather than under the reporting and disclosure provisions. Whether disclosure obligations can arise from sources other than ERISA's disclosure provisions can and should await further development in the law. Again, there is no warrant now for this Court to intervene.

C. The Instant Case Is A Procedural Sideshow; *Jacobson*, Still In The Ninth Circuit, Presents The Substantive Issue.

The instant case is not insignificant – the Ninth Circuit found the issue important enough to hear it *en banc* – but at bottom it is a procedural prelude to the dispute on the merits. The merits case is *Jacobson*, pending in the Ninth Circuit. While the Ninth Circuit's decision in the instant case may well be a final judgment for jurisdictional purposes, from the standpoint of the dispute in its entirety, review at this time is premature. If Petitioners were to prevail on the merits in *Jacobson*, they would claim attorneys' fees under ERISA § 502(g), 29 U.S.C. § 1132(g), potentially mooting the funds-solicitation objective underlying the instant case. For this reason as well this Court's review now would be improvident.

D. The *En Banc* Decision Is Fully Consistent With The Decisions Of This Court.

While Petitioners argue that the Ninth Circuit's interpretation of ERISA's general fiduciary duty provision ignores a generalized "edict" of this Court, they totally ignore the fact that the *en banc* decision is specifically presaged by this Court's holding in *Curtiss-Wright Corp. v. Schoonejongen*, 131 L. Ed. 2d 94 (1995).[2] There this Court

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[2] Nothing in this Court's recent decision in *Varity Corp. v. Howe*, 64 U.S.L.W. 4138 (1996) affects this analysis. The Court had no question before it concerning the reach of ERISA's disclosure provisions, and the information there in question obviously related to benefits in a way that the instant case does not.

interpreted another fiduciary responsibility section, Section 402(b)(3), 29 U.S.C. § 1102(b)(3), which requires that an appropriate amendment procedure be part of a plan. Those respondents argued that the amendment procedure must include sufficient detail "to enable beneficiaries to learn their rights and obligations under the plan at any time," and thus serve an informational function. 131 L. Ed. 2d at 103. This Court responded that ERISA "has an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations," and that scheme is based on "written plan documents." *Id.* The Court continued that the plan documents scheme is given effect "through a comprehensive set of 'reporting and disclosure' requirements, see 29 U.S.C. §§ 1021-1031, of which § 402(b)(3) is not part." *Id.*

After reviewing a number of ERISA's reporting and disclosure provisions, including the provision requiring an administrator to furnish information to participants pursuant to Section 104(b)(4), 29 U.S.C. § 1024(b)(4), which is the provision interpreted here, this Court refused to supplement Congress's informational scheme set out in the reporting and disclosure provisions by interpreting the fiduciary provision, Section 402(b)(3), to include an informational function. This Court stated:

> This may not be a foolproof informational scheme, although it is quite thorough. Either way, it is the scheme that Congress devised. And we do not think Congress intended it to be supplemented by a far-away provision in another part of the statute, least of all in a way that would lead to improbable results . . . .

131 L. Ed. 2d at 104.

Petitioners do not even argue that the Ninth Circuit's additional finding that the participant list is not a plan document ignores any "edict" of this Court. They do, however, assert that it is an important and unsettled question. But the Ninth Circuit settled the question, and in the manner suggested by *Curtiss-Wright*. There the Court considered the reach of ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), stating:

> ERISA requires that every plan administrator make available for inspection in the administrator's "principal office" and other designated locations a set of all currently operative, governing plan documents, see § 1024(b)(2), which necessarily includes any new, bona fide amendments. See also § 1024(b)(4) (requiring plan administrators, upon written request, to furnish beneficiaries with copies of governing plan documents for a reasonable copying charge).

131 L. Ed. 2d at 103-04. By referring to "governing plan documents," or documents that set out the plan itself, the Court suggested that the administrator's obligation to turn over certain specified documents to participants did not include other documents, such as work papers, letters or participant mailing lists.

Petitioners' arguments, then, are far from the mark. The Ninth Circuit's interpretations of both the plan instruments and general fiduciary duty provisions not only are consistent with, they trace themselves from prior holdings of this Court.

Petitioners argue, however, that the *en banc* decision, to the extent that it rejects their fiduciary duty argument,

deviates from this Court's general pronouncement in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). (Pet. 6.) They claim that the Ninth Circuit has somehow reduced a right to information that, as we shall see *infra*, they erroneously assert existed at common law. *Bruch* is inapplicable here. The instant case presents a simple question of statutory interpretation that is resolved on the basis of the statutory language.

ERISA's general fiduciary duty provision, Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), requires a fiduciary to discharge his duties solely in the interest of participants and beneficiaries and for the exclusive purpose of "providing benefits to participants and their beneficiaires" and "defraying reasonable expenses of administering the plan." Hence, the focus of the inquiry below was whether the disclosure of the names and addresses was sufficiently related to the provision of benefits or defrayment of expenses to trigger any disclosure obligation under this general fiduciary provision. The Ninth Circuit analyzed the nature of the information sought to determine if it satisfied the express statutory requirement and concluded that "the right to solicit support for litigation that might result in greater pension benefits" is insufficiently related to the provision of benefits, the statutory touchstone. (App. 15a.)

Petitioners ignore this finding, grounded as it is in the statutory wording, and seek instead to invoke some purported right to communicate that should be left to

Congress to address.[3] Nothing in *Bruch* is to the contrary. Petitioners argue that the decision generally conflicts with this Court's pronouncement in *Bruch* that, as Petitioners recast it, "ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans and not to afford less protection to employees and their beneficiaries than they enjoyed under the common law before ERISA was enacted." (Pet. 6.)

Of course, this Court's decision in *Bruch* can in no way be interpreted as a mandate that ERISA must always be construed in a way that favors the claims asserted by plan participants. Nor did this Court in *Bruch* hold that Congress intended to incorporate the entire pre-existing body of state trust law (to the extent such a thing could even be defined) into ERISA "lock, stock and barrel." *Nieto v. Ecker*, 845 F.2d 868, 872 n.2 (9th Cir. 1988). To the contrary, just last month this Court observed that Congress did not intend the automatic and wholesale incorporation of trust law into ERISA: "[W]e believe that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA's fiduciary duties." *Varity Corp. v. Howe*, 64 U.S.L.W. 4138, 4140 (1996).

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[3] Significantly, although Petitioners first quote the two ERISA provisions brought in question by their petition, they then proceed to ignore those provisions in their discussion.

E. The *En Banc* Decision Is Correct.

Petitioners' fiduciary duty argument is based upon three unsupported and unfounded propositions: first, that in enacting ERISA, Congress intended to incorporate the entirety of trust law; second, that the common law of trusts clearly establishes the right of pension plan participants to obtain information about other participants; and third, that the *en banc* decision of the Ninth Circuit "substantially impaired and in some instances erased entirely" the ability of plan participants to enforce their rights under ERISA. (Pet. 12.)

Not only did Congress not incorporate the entire body of trust law, as already noted, but the fact that the common law of trusts is considered when interpreting ERISA in no way mandates the wholesale inclusion of any "principle" for which no clear case law authority is found emanating from the state courts.[4] Petitioners here once again cite the same few cases they relied upon before the Ninth Circuit, without so much as offering any response to the *en banc* Court's analysis of this meager authority.[5] That analysis, set forth in footnote 6 of the

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[4] See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300-02 (7th Cir. 1995), where the Court, by Chief Judge Posner, points out the absence of any "general" common law of torts, noting the distinctions in that law among the states, and holding that class certification was inappropriate as a result.

[5] Even farther afield is Petitioners' reference to the common law of corporations, involving issues of corporate democracy, corporate voting and corporate governance not presented here. (Pet. 9-10.)

Ninth Circuit's decision, undercuts Petitioners' arguments completely.[6] (App. 16a, n.6.)

Petitioners also advance the unsupported proposition that the rights of ERISA participants cannot be enforced without access to participant lists.[7] (Pet. 12.) This argument is belied by twenty years of the successful administration of ERISA. If Petitioners were right, one would think that their argument by this time would have been resolved. The lack of prior precedent outside the Ninth Circuit is mute evidence that Petitioners' claims are overblown. Moreover, Petitioners ignore altogether the Ninth Circuit's observation that the statute's attorneys' fees provision addresses specifically the concerns they raise. (App. 17a.) Petitioners in any event offer nothing in the way of evidence or argument that the ability to enforce statutory or plan rights is harmed, other than the implicit argument that in litigation, a bigger war chest is better

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[6] The only common law state court authority requiring the disclosure of names and addresses involved the solicitation of votes from co-beneficiaries of a voting trust (*Morris v. Broadview, Inc.*, 338 Ill. App. 99, 86 N.E. 2d 863 (1949)), and the solicitation of consents to assume control of the trust corpus (*Baydrop v. Second Nat'l Bank*, 120 Conn. 322, 180 A. 469 (1935)), far cries from the situation presented here. These two old, inapposite decisions hardly constitute a "body of law" at all, let alone one that Congress could be presumed to have incorporated by reference in enacting ERISA.

[7] Petitioners repeat this assertion as a part of their plan instrument argument under Section 104(b)(4), 29 U.S.C. § 1024(b)(4). (Pet. 15.) A participant list, however, is not an "instrument" or a "governing plan document," and it provides "no information about the plan or benefits," as the Ninth Circuit concluded. (App. 8a, 9a.)

than a small one. That argument, however, would just as readily warrant a finding that ERISA requires fiduciaries to directly fund lawsuits against themselves as it would a finding that they are required to do so indirectly by assisting participants in fundraising efforts.

Ultimately, Petitioners ignore the wealth of disclosure requirements and remedies Congress enacted in ERISA. Administrators are required, pursuant to the reporting and disclosure provisions in ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031, to provide plan descriptions, summary plan descriptions, notice of modifications, annual reports and statements of benefit accruals to participants, among other documents. This case cannot be brought within those statutory rights. As for their litigation expenses, ERISA's administration and enforcement provisions allow recovery of any benefits due them and their attorneys' fees and costs. ERISA § 502(a), (g), 29 U.S.C. § 1132(a), (g). Of course, that is exactly what Petitioners will seek to do if they prevail in the related *Jacobson* case now pending before the Ninth Circuit.[8] Effectively, Petitioners seek to utilize this action to obtain premature discovery for their action on the merits, leading the *amici*

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[8] This Court's attorneys' fees jurisprudence has well established that even *prevailing* plaintiffs are not entitled to a fees windfall, *City of Burlington v. Dague*, 505 U.S. 557 (1992) (rejecting a "multiplier," even after success on the merits), or to interim fees awards short of clear-cut success on the merits, *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (rejecting an interim fees award). By analogy here, petitioners should wait to see if they prevail in *Jacobson*, at least on an interim basis sufficient under the *Hanrahan v. Hampton* test, before being heard to contend that a federal statute gives them a basis for funding their litigation.

to express grave concern for their right to privacy and the excessive costs to the Plan that would attend the requested disclosure. (App. 19a, nn. 8, 9.) Not only is this the tail wagging the dog, but the balancing of such interests in competition with any interests that may be served by disclosure is, as the Ninth Circuit observed, best left to Congress. (App. 20a.)

III. CONCLUSION

For the foregoing reasons, the Administrator respectfully requests that the Court deny the Petition for Writ of Certiorari.

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Respectfully submitted,

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